77-467

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

CHAD E. CHAPMAN,

Petitioner,

vs

File No.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

SUBMITTED BY:

LAW OFFICES JERRY L. SUMPTER, J.D.
JERRY L. SUMPTER, J.D.
Attorney for Petitioner
702 South Main Street
Cheboygan, Michigan 49721
Phone: (616) 627-7167

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases (Cont'd)

Cases (Cont'd)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

CHAD E. CHAPMAN,

Petitioner,

vs

THE PEOPLE OF THE
STATE OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES SUPREME COURT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Chad E. Chapman, petitioner herein, prays that a Writ of Certiorari issue to review the final order of the Supreme Court of the State of Michigan entered on June 29, 1977 in

PEOPLE OF THE STATE OF MICHIGAN V CHAD E. CHAPMAN. That final order denied Application for leave to appeal the opinion of the Court of Appeals for the State of Michigan, decided February 3, 1977. The Court of Appeals for the State of Michigan had affirmed the Circuit Court conviction entered December 30, 1975.

OPINIONS BELOW

The Order of the Michigan Supreme Court entered June 29, 1977, being Case No. 594461, is printed in Appendix A, at Page 24.

The Opinion of the Court of Appeals for the State of Michigan, being Case No. 27683, is printed in Appendix A, at Page 26 .
The Opinion has not yet been reported.

The decision of the Circuit Court for the County of Presque Isle, being Case No. 75-000647-AR, is printed in Appendix A, at Page 37. The Circuit Court affirmed the Motion to Suppress, first denied in the District Court, being Case No. 1021, which is printed in Appendix A at Page 45.

JURISDICTION

The final Order of the Supreme Court for the State of Michigan was entered on June 29, 1977. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 USC 1257(3).

QUESTIONS PRESENTED

I

WHETHER A WARRANTLESS SEARCH AND SEIZURE BY A CONSERVATION OFFICER OF A PRIVATE DWELLING WHICH HAD BEEN ON FIRE IS UNCONSTITUTIONAL WHEN THERE ARE NO EXIGENT CIRCUMSTANCES REQUIRING A WARRANTLESS SEARCH.

II

WHETHER EVIDENCE OBTAINED BY A WARRANTLESS SEARCH MEETS THE "PLAIN VIEW" TEST WHEN THERE IS NO JUSTIFICATION FOR A CONSERVATION OFFICER'S PRESENCE, THERE IS A DIRECT CONNECTION BETWEEN HIS PRESENCE AND THE SEARCH, THE EVIDENCE WAS NOT INADVERTENTLY DISCOVERED, THE EVIDENCE WAS NOT CLEARLY CONTRABAND, AND THERE WAS NO POSSIBILITY OF REMOVAL OF THE EVIDENCE PRIOR TO OBTAINING A WARRANT.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right to be secure from unreasonable searches and seizures, guaranteed by the Fourth and Fourteenth Amendments:

AMENDMENT IV:

> The right of the people to be secure in their houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV, § 11:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The State of Michigan has incorporated a similar prohibition against unreasonable searches and seizures in the State Constitution:

ARTICLE 1, § 11:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive, or other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this State.

The defendant was charged with violation of the bag limit statute relating to illegal possession of deer. M.C.L.A. 312.12:

> Section 12. It shall be unlawful for any person to kill in any one day, or have in possession at any one time, or to kill in any one season, more game animals or game birds than hereinafter enumerated, or to have in

possession on the first day of the open season more than one day's possession limit.

Deer - either sex -
Presque Isle - (1)

STATEMENT OF THE CASE

THE FACTS

This is a search and seizure case involving the authority of a conservation officer acting in concert with members of a volunteer fire department to conduct a warrantless search and seizure of a private home.

On December 23, 1974, a volunteer Fire Department was summoned to extinguish a fire in a private dwelling. The blaze was extinguished in about fifteen minutes and was confined to the main part of this single unit dwelling. An attached breezeway and garage were not touched by the fire; however, the Fire Chief proceeded through the breezeway and into the garage in order to clear the smoke. The Fire Chief observed a deer hanging in the garage. He suspected this deer was illegal, but had no way of knowing for certain. He did not proceed

to petition a magistrate for a warrant. He did summon another firefighter, who was affiliated with a police agency, and instructed him to guard the door while a game warden was located.

When the conservation officer arrived, a full search of the garage occurred, and the original deer hanging from a stringer was found, as well as a doe head, a doe and fawn. All this was immediately seized and was the evidentiary basis for the charge of exceeding the bag limit of one deer per season or in possession.

No search warrant was ever obtained, nor was one ever sought. The premises were unoccupied at the time. The owner of the dwelling was not on the premises when these events transpired. The presence of a police officer guarding the private dwelling eliminated any possibility of the evidence being removed.

THE PROCEEDINGS BELOW

After issuance of the warrant, a Motion to Suppress the Evidence, because it was obtained in violation of the Fourth Amendment, was timely filed. A transcript of the hearing held February 4, 1975, forms the basis for this appeal, and shall be presented at a later date as Appendix B. The District Court denied this motion in an Opinion issued March 5, 1975. Subsequent to this, the Defendant was convicted in a jury trial on May 27, 1975, and the physical evidence was used in the trial.

A timely appeal was filed in the Presque Isle Circuit Court, and the denial of the motion to suppress and the conviction were affirmed on December 30, 1975. (Opinion hereinafter attached in Appendix A, Page 37). The Circuit Court held that firefighters had a right to enter the residential annex to fight the fire and the

evidence was in their plain view. Thus, there was no search and no constitutional violation.

This issue was timely appealed to the Michigan Court of Appeals, who likewise, affirmed the lower courts. (Opinion hereinafter attached in Appendix A, Page 26). The Court of Appeals ruled that once the firefighter was rightfully in a position to view the evidence, he had a duty to seize it, which he did. Because the evidence was in plain view, they could be lawfully seized without a warrant.

Application for leave to appeal was timely filed with the Michigan Supreme Court, however, the petition was denied. (Order denying Application hereinafter attached in Appendix A, Page 24).

All courts have failed to meet the dual issues presented; (a) that there must be 'exigent circumstances' for warrantless searches of a

private dwelling and (b) the prerequisites for invoking the 'plain view' test have never been met.

REASONS FOR GRANTING THE WRIT

A. The Michigan Courts Have Excised the "Exigent Circumstances" Requirement

This case compels review by this Court because the Michigan Appellate Courts have opened a gaping hole in the Fourth Amendment prohibition against unreasonable searches and seizures of private dwellings. Their affirming the warrantless search of a private dwelling, in the absence of any exigent circumstances, conflicts squarely with the explicit rulings and spirit of landmark decisions of this Court. Under a strained interpretation of "plain view", quasi-official law enforcement agents (such as firemen and conservation officers) are now granted greater authority than policemen!

The Michigan Courts have thus far mis-

construed and misapplied the historic rulings in such cases as Katz v United States, 389 US 347; 88 S. Ct 507; 19 LEd2d 576 (1967) and United States v Lee, 274 US 559; 47 S.Ct 746; 71 LEd 1202 (1927). The effect has been to create a new exception to the constitutional prohibitions against warrantless searches.

It is a prerequisite to valid warrantless searches that "exigent circumstances" mandate an immediate search and permit dispensing with the constitutional warrant procedure. The decisions of the Michigan Courts have incorporated the principles established by this Court and demand a showing of exigent circumstances. DNR v Seaman, 396 Mich 99; People v White, 392 Mich 404; People v Brow, 67 Mich App 407; People v Olajos, 397 Mich 629; People v Carl, 71 Mich App 251. However, the Michigan Court of Appeals did not even use the words "exigent

construed and misapplied the historic rulings in such cases as Katz v United States, 389 US 347; 88 S. Ct 507; 19 LEd2d 576 (1967) and United States v Lee, 274 US 559; 47 S.Ct 746; 71 LEd 1202 (1927). The effect has been to create a new exception to the constitutional prohibitions against warrantless searches.

It is a prerequisite to valid warrantless searches that "exigent circumstances" mandate an immediate search and permit dispensing with the constitutional warrant procedure. The decisions of the Michigan Courts have incorporated the principles established by this Court and demand a showing of exigent circumstances. DNR v Seaman, 396 Mich 99; People v White, 392 Mich 404; People v Brow, 67 Mich App 407; People v Olajos, 397 Mich 629; People v Carl, 71 Mich App 251. However, the Michigan Court of Appeals did not even use the words "exigent

circumstances" in its opinion and totally failed to address itself to this threshhold question.

The reason for this failure is clear from the record before the lower courts. There were no exigent circumstances! The homeowner was not in the dwelling. The garage containing the contraband was being guarded by a volunteer fireman (who happened to be an off-duty policeman). There was no demonstration why a prompt application for a warrant would not have been immediately approved. This refusal to respect the Fourth Amendment rights of the defendant is an affront to the established principal of Carroll v United States, 267 US 132 (1925) holding that:

> "In cases where the serving of a warrant is reasonably practical, it must be used . . ."

B. The Michigan Courts Have Emasculated the "Plain View" Prerequesite.

The only basis for the decision of the Michigan Court of Appeals was invoking the "plain view" doctrine. However, the Court of Appeals ignored not only vital distinctions which render plain view applicable, but also ignored the fact that "plain view" has an exigent circumstance requirement of its' own.

Michigan has adopted and followed the basic plain view doctrine set forth in Coolidge v New Hampshire, 403 US 443 (1971); (a) prior justification for intrusion of a police officer; (b) inadvertently coming across a piece of evidence; and (c) a legitimate reason for being unconnected with a search directed against the accused. Further, Michigan has added two elements to

these prerequisites: (d) the evidence must be clearly contraband, and (e) the evidence must be able to have been removed during the time required to obtain a warrant, People v Brow, 67 Mich App 407 (1976). This last factor, (e), is a restatement of the exigent circumstance requirement.

The Michigan Court of Appeals found that the "seizure" was conducted by Mr. Bader, the fireman and off-duty policeman, who the Firechief summoned to guard the garage. Although this is the only possible analysis which could even trigger a colorable "plain view" claim, it is totally erroneous. The Firechief only saw one deer. It was not against the law to possess one deer. Rather, it was the conservation officer who was summoned to the scene who physically examined the entire interior of the garage and seized

three contraband deer. It was the conservation officer who violated the defendant's constitutional rights. Mr. Badder couldn't and didn't conduct either the search or the seizure - - - he merely stood at the door.

It must be pointed out that the Court of Appeals focused on Mr. Badder for precisely the reason which makes the search so offensive.

However, Mr. Badder was ordered to approach the evidence to guard it and did not come across it inadvertently. Further, his presence was directly connected to the suspected contraband. However, the contraband itself was not "clearly illegal". There was only deer (allowed by statute). It was night. The garage was filled with smoke and Mr. Badder never entered the garage before the conservation officer arrived.

Most important, however, there was no reason why a warrant could not issue immediately. The evidence was under police guard and was in no danger of being removed.

The policy implications of this ruling are substantial and significant. Every fire department could have a part-time policeman employed to conduct otherwise illegal searches of "suspicious" houses. Or, firemen could simply call the police direct whenever and wherever their wanderings take them. The Constitution clearly forbids these warrantless excursions. However, the Michigan Courts are apparently prepared to sanction them. We are not dealing with an automobile search which carries the less rigorous standard than invasions of private dwellings. The defendant had a constitutional right and expectation of privacy which was trampled underfoot in the interest of convenience.

Perhaps the Michigan Courts would show greater sensitivity if great quantities of illicit drugs, or perhaps, human bodies were involved. However, it is precisely such "silent approaches and slight deviations" which this Court has zealously forbidden, Boyd v United States, 116 US 616, 6 S Ct 524, 29 LE 746; Schneckloth v United States, 412 US 218, 93 S Ct 2041, 36 L Ed 2d 854 (1973).

The constitutional harm is immediate, irrepairable, and far reaching. This Court's intervention and relief, is justified, warranted, and compelled.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Dated: September 19, 1977

Respectfully submitted,

LAW OFFICES JERRY L. SUMPTER

JERRY L. SUMPTER, J.D.
Attorneys for Petitioner
702 South Main Street
Cheboygan, Michigan 49721
Phone: (616) 627-7167

APPENDIX A

APPENDIX A

ORDER OF MICHIGAN SUPREME COURT

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 29th day of June, in the year of our Lord one thousand nine hundred and seventy-seven.

PRESENT: The Honorable

THOMAS GILES KAVANAUGH,
Chief Justice,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices.

CR 19-319

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

59446 COA: 27683
LC: 75-000647-AR

vs

CHAD E. CHAPMAN,

Defendant-Appellant.

_____/

On order of the Court, the application for Leave to appeal is considered, and it is DENIED, because the appellant has failed to persuade the Court that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN-ss

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original , and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 29th day of June, in the year of our Lord one thousand nine hundred and seventy-seven.

/s/ Corbin R. Davis
Deputy Clerk

APPENDIX A

DECISION OF MICHIGAN
COURT OF APPEALS

State of Michigan

Court of Appeals

People of the State of Michigan,

Plaintiff-Appellee,

No. 27683

vs

CHAD E. CHAPMAN,

Defendant-Appellant.

BEFORE: S. J. Bronson, P.J., and J.H. GILLIS and V.J. Brennan, J.J.

BRONSON, P.J.

Defendant appeals by leave granted from circuit court affirmance of his misdemeanor conviction for illegal possession of more than one deer. MCLA 312.12; MSA 13.1341. Defendant's primary attack on the conviction is directed

at the district court's denial of his motion to suppress evidence. Defendant contends that the three deer or parts thereof, which were seized from his residence, should have been suppressed as the result of an illegal search and seizure.

The factual situation out of which this search and seizure claim arises is unusual.

The record discloses that on December 23, 1974, at approximately 11:45 p.m., the Onaway Volunteer Fire Department was notified of a fire at the home of defendant. Defendant's house was ablaze when they arrived, and the volunteer firemen spent the next 15 minutes or so in bringing the fire under control.

The blaze was apparently limited to the main part of the house. When the fire was substantially under control, the fire chief, a truck driver by profession, entered a

breezeway which connected the house to a garage in order to open some windows and doors to vent the heavy accumulation of smoke. His object was to permit the firemen to see what they were doing when they entered the house to mop up.

The chief entered the garage looking for another door to open. In the garage, he observed one deer hanging on a stringer, plus a doe head and a buck lying on some cement blocks. Suspecting that the deer were possessed illegally, he called one of the volunteer firemen, a Mr. Badder, and told him to keep everyone out of the garage.

Mr. Badder, a part-time police officer as well as a volunteer fireman, complied with this directive and stood at the door to the garage. While standing there, he observed the deer in the garage.

It appears that Badder's sole purpose in being on the premises was to help put out the fire

and that he went and stood by the garage door pursuant to the order of the fire chief only in furtherance of this firefighting function. There has been no suggestion that Badder's purpose in being on the scene was to further any criminal investigation or that he had any reason to suspect that illegal venison was in defendant's house.

While Badder secured the garage and the other firemen finished mopping up the fire, the fire chief sent word to the game warden. A State of Michigan conservation officer received the report that illegal deer had been found in defendant's house, drove to Onaway, and picked up the deer.

Defendant claims that his right to be protected against unreasonable searches and seizures was violated when the conservation officer entered the garage and removed the

deer without obtaining a warrant. We disagree that the absence of a search warrant rendered the deer a product of an illegal search and seizure. We find that no illegal search and seizure occurred because there was no search.

The deer were seized by a police officer, Mr. Badder, after they had inadvertently come within his plain view while he was lawfully in a place where he had a right to be.

The basic rules underlying our decision were well stated in two recent Supreme Court cases. In People v Whalen, 390 Mich 672, 677; 213 NW2d 116 (1973), the Supreme Court said:

> "As stated by the United States Supreme Court in Coolidge v New Hampshire, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971) the basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment- subject only to a few specifically established and well delineated exceptions.

"However, before the above rule can be applied, and the exceptions to it come into play, it first must be established from the facts before the court, that a search did in fact take place for Fourth Amendment purposes.

"From Katz v United States, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967) there has evolved a test, applied by the courts, to determine whether or not a search, by Fourth Amendment standards, has indeed taken place. Simply put, if an individual has a reasonable expectation of privacy in the area searched, or the materials seized, a search has been conducted. 'What a person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protection.' Katz, supra, 351.

"Thus seizure of objects within the plain view of an officer, lawfully in a place where he had a right to be, are not proscribed by the Constitution. United States v Lee, 274 US 559; 47 S Ct 746; 71 L Ed 1202 (1927)."

The Supreme Court had previously adopted the following rule in People v Tisi, 384 Mich 214, 218; 180 NW2d 801 (1970):

"In the recent case of Harris v United States (1968), 390 US 234 (88 S Ct 992, 19 L Ed 2d 1067), the Court said (P236):

> " 'It has long been settled that objects falling into the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.'"

Under the plain view doctrine, by which the instant seizure is justified, the most crucial inquiry is how the police officer came to be in the position from which he was able to view the materials seized. Once rightfully in such a position, he has a right, if not a duty, to seize objects which he has a reasonable basis for believing are fruits or implements of a crime, contraband, or evidence. See People v R.B. Hunter and Carl G. Guster, [72] Mich App [191] (1976) (Docket Nos. 24948 and 25559, released November 9, 1976); United States v Williams, 385 F Supp 1400 (ED Mich, 1974). The Fourth Amendment provides no protection to such objects which are knowingly exposed. Katz, supra, p 351.

The more common justifications for a police officer's presence on the premises of a private individual without a search warrant involve cases concerning the execution of an arrest warrant, cases of "hot pursuit", cases of consent or invitation of the officer's presence, and permissible automobile stops.[1] The common principle running through those cases is that where the initial intrusion into the property is not barred by the Fourth Amendment, inadvertent observations made in the course of such an intrusion are similarly without the purview of that amendment.

Here the justification for Badder's presence on the premises of defendant arose from the circumstance that defendant's home was on fire and Badder was fighting that fire in the capacity of a fireman. There is no basis in this case for any suspicion that Badder was on the

premises in order to conduct a search. Our Supreme Court has upheld the validity of a seizure made under similar circumstances, People v Chimovitz, 237 Mich 247; 211 NW 650 (1927), and intervening developments in the law of search and seizure have not altered the premise of that case.

When Badder saw the deer in the garage, what he saw was a possible misdemeanor being committed in his presence. People v Kuntze, 371 Mich 419, 427; 124 NW2d 269 (1963). He had a right to seize the evidence of the crime, and he did so by standing guard at the door and permitting no one to enter the garage. There was no need for him to physically pick up the deer and carry them into the street before turning them over to the conservation officer. Since the deer were in the possession of a police officer when the conservation officer arrived on the scene,

no Fourth Amendment violation occurred when they were turned over to him. We conclude that the trial court correctly denied defendant's motion to suppress.

Defendant next asserts that reversible error occurred because the prosecutor did not indorse any res gestae witnesses. However, the duty to indorse res gestae witnesses is statutory, MCLA 767.40; MSA 28.980, and we are aware of no statute or case requiring the indorsement of witnesses when a misdemeanor prosecution proceeds directly from a complaint rather than an information. Defendant does not claim that there were witnesses who should have been called by the prosecutor but were not, and defendant admits that he knew of the witnesses called by the prosecutor. Under the circumstances, we find no error.

Defendant finally asserts that the statute under which he was convicted required that the prosecutor prove that the deer were killed illegally. Defendant is wrong. The statute reads in pertinent part as follows:

> "It shall be unlawful for any person to * * * have in possession at any 1 time * * * more game animals * * * than hereinafter enumerated * * *."

The statute goes on to prohibit possession of more than one deer at any one time. Defendant was shown to have been in possession of three deer, two more than permitted, and the conviction must be sustained.

Affirmed.

APPENDIX A

---

[1] See discussion in Coolidge, supra, pp 465-466.

APPENDIX A

Decision of the Trial Court

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF PRESQUE ISLE

PEOPLE OF THE STATE OF MICHIGAN

Plaintiffs,

vs

File 75-000647-AR

CHAD E. CHAPMAN,

Defendant.

Decision of the Court

Statement of Facts

Defendant/Appellant, Chad E. Chapman, appeals from a jury conviction of willful and illegal possession of deer or deer parts, contrary to MCLA 312.12 and 312.14.

On December 23, 1974, at approximately 11:45 p.m., the Onaway Volunteer Fire

Department arrived at Defendant's home, which was ablaze, Duane Badder and Jim Badgero, members of the Volunteer Fire Department, assisted in bringing the fire under control, which effort encompassed approximately 15 minutes. After the blaze was extinguished, fireman Hitchcock entered a breezeway and garage attached to the main residential structure, to vent out smoke which was throughout the entire area. At this time Hitchcock observed one deer hanging on a stringer, and a doe head and a buck faun laying over some cement blocks. Badder, who was also a part-time policeman, at the request of Hitchcock, made a similar observation. The area was then secured by Badder and a conservation officer was summoned to the scene. Upon his arrival, the deer was taken from the building.

Defendant made a pretrial motion to suppress the deer and deer parts, claiming a violation of the Fourth and Fourteenth Amendments of the United States Constitution, and a violation of Article I, Section 11 of the Michigan Constitution. The District Judge, upon completion of a hearing on the motion to suppress, denied Defendant's motion. The physical evidence was used by the People at trial.

The People's pleadings (Complaint and Warrant) did not list the names of the People's witnesses. (Defendant concedes that he had prior knowledge of the existence of the People's witnesses who testified at the time of trial.) At the time of trial, Defendant objected to the non-production of alleged res gestae witnesses. Before commencement of trial, Defendant did not move for compulsory process or to add witnesses.

Conclusions of Law

I

Defendant's contention that the physical evidence (the deer and deer parts) were the product of an unreasonable search and seizure cannot be sustained. The fire fighters had a right to enter the attached residential annex to effectively deal with the fire. The evidence in question was in plain view of fire fighter Hitchcock and fire fighter Badder (which latter person was also a policeman). Since the evidence was in plain view of persons having a right to be where they were, there was no search. Sans search, sans a Constitutional violation.

The evidence was promptly secured by the fire fighters and its possession was promptly delivered to the conservation officer. This action is consistent with Defendant's Constitutional Rights.

People vs Harden, 54 Mich App 353;

People vs Kullick, 57 Mich App 126.

See also People vs Dajnowicz, 43 Mich App 465, where at page 474 the Court says as follows:

> "In many instances, a fire investigator must have immediate access to a dwelling which was gutted by fire. Some of the reasons for this need are to make sure the fire is out, to check to see if there are persons or valuables inside, and numerous other factors which must be determined to protect the safety and general welfare of the public.
>
> "The rule that searches must be made pursuant to a warrant is subject to a certain well-defined exception. In Camara, the Court recognized one exception to the rule that warrants must be obtained for the purpose of making administrative investigations . . . We adopt this limitation to the rule that a warrant is required when fires are being investigated."

Likewise, Defendant's contention that res gestae witnesses must be endorsed in a misdemeanor case (or failing that such witnesses cannot be produced at trial) must fail.

MCLA 767.40 requires the endorsement of res gestae witnesses on Informations. People v Keywell, 256 Mich 139. There is no requirement in the law to furnish written endorsement on a Complaint filed in a misdemeanor case. People vs Belleville, 56 Mich App 275 does not support Defendant's claim. Rather, Belleville required the production by the People of essential witnesses to insure Defendant a fair trial. In a criminal case the People cannot properly claim a conviction upon evidence which shows but a part of the whole transaction. However, there is no requirement in the case of a misdemeanor that all res

gestae witnesses be produced or excused.

Further, in this case it does not appear that the alleged res gestae witnesses were known to the Prosecutor; were capable of being produced by him; or that such witnesses were more than cumulative. Even if endorsement were required in a misdemeanor case, failure to endorse such witnesses under these circumstances would not constitute reversable error.

III

The evidence produced at the trial was sufficient to sustain the verdict of the jury. The function of this Court on review is not to be a reviewing jury, but to examine the record on Appeal and ascertain if the jury's determination is supported by creditable evidence. People v Heard,

19 Mich App 516; People vs Edwards, 35 Mich App 233; People vs Stewart, 36 Mich App 93.

An examination of the record on Appeal convinces this Court that there exists a sufficient basis for the jury's determination.

RELIEF GRANTED

This Court affirms the trial Court's denial of Defendant's motion to suppress, and affirms the conviction of the Defendant.

Dated: 12-30-75 /s/ Martin B. Breighner
CIRCUIT JUDGE

APPENDIX A

ORDER DENYING MOTION TO SUPPRESS

State of Michigan

In the 89th District Court for the County of Cheboygan

People of the State of Michigan,

Plaintiff,

v Case No. 1021

Chad E. Chapman,

Defendant.

Order Denying Motion To Suppress Evidence

At a session of Said Court Held March 5, 1975.

PRESENT: HONORABLE PHILIP S. TSCHIRHART
District Judge

This matter having come on to be heard before this Court based upon the defendant's Motion to Suppress Evidence,

And each party having presented its arguments in open court on February 4, 1975,

And this Court being informed in the premises and being of the opinion that the items seized were not the result of an unlawful seizure and that a search warrant need not have been issued prior to the seizure because the privacy and security of the Defendant was not disturbed contrary to law,

Now, Therefore,

IT IS ORDERED AND ADJUDGED that the Defendant's Motion to Suppress Evidence be and the same is hereby denied.

/s/ Philip S. Tschirhart
District Judge

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1977

CHAD E. CHAPMAN,
Petitioner,

v

PEOPLE OF THE
STATE OF MICHIGAN,
Respondent.

File No. 77-467

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Larry F. Farmer (P13301)
Prosecuting Attorney

Thomas C. Nelson (P25147)
Assistant Attorney General
Department of Attorney General
Prosecuting Attorneys
Appellate Service
610 Law Building
525 West Ottawa
Lansing, Michigan 48913
Telephone: (517) 373-7971

Mary E. Delehanty
Research Assistant

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1977

TABLE OF CONTENTS

INDEX OF AUTHORITIES

OPINION BELOW

Respondent accepts Petitioner's statement of opinion below.

STATEMENT OF JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction.

QUESTION PRESENTED

Respondent would state the issue for consideration as follows: whether evidence inadvertently discovered and seized by firemen in the course of extinguishing a fire violated the Fourth Amendment's proscription of unreasonable searches and seizures.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

CHAD E. CHAPMAN, Petitioner, v PEOPLE OF THE STATE OF MICHIGAN, Respondent.	File No. _____

STATEMENT OF FACTS

Respondent accepts the following statement of facts as set forth in the Court of Appeals Opinion:

> The record discloses that on December 23, 1974, at approximately 11:45 p.m., the Onaway Volunteer Fire Department was notified of a fire at the home of defendant. Defendant's house was ablaze when they arrived, and the volunteer firemen spent the next 15 minutes or so in bringing the fire under control.
>
> The blaze was apparently limited to the main part of the house. When the fire was substantially under control, the fire chief, a truck driver by profession, entered a breezeway which connected the house to a garage in order to open some windows and doors to vent the heavy accumulation of smoke. His object was to permit the firemen to see what they were doing when they entered the house to mop up.

The chief entered the garage looking for another door to open. In the garage, he observed one deer hanging on a stringer, plus a doe head and a buck lying on some cement blocks. Suspecting that the deer were possessed illegally, he called one of the volunteer firemen, a Mr. Badder, and told him to keep everyone out of the garage.

Mr. Badder, a part-time police officer as well as a volunteer fireman, complied with this directive and stood at the door to the garage. While standing there, he observed the deer in the garage.

It appears that Badder's sole purpose in being on the premises was to help put out the fire and that he went and stood by the garage door pursuant to the order of the fire chief only in furtherance of this firefighting function. There has been no suggestion that Badder's purpose in being on the scene was to further any criminal investigation or that he had any reason to suspect that illegal venison was in defendant's house.

While Badder secured the garage and the other firemen finished mopping up the fire, the fire chief sent word to the game warden. A State of Michigan conservation officer received the report that illegal deer had been found in defendant's house, drove to Onaway, and picked up the deer.

People v *Chad E. Chapman*, 78 Mich App 547, 549-550; 252 NW2d 511 (1977), [Petitioner's Appendix A, p. 27-29]

REASONS FOR DENYING THE WRIT

Petitioner contends that three deer, or parts thereof, should have been suppressed as the result of an illegal search and seizure.

It is clear that the Fourth Amendment, recognizing that an individual's right to privacy must be maintained, protects such individuals from unreasonable searches and seizures. As stated in *Coolidge* v *New Hampshire*, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971), the standard constitutional doctrine is that a search conducted without prior approval from an independent magistrate is per se unreasonable under the Fourth Amendment. This doctrine, however, is subject to a few narrowly-described exceptions.

The "plain view" doctrine is one of these exceptions and was fully explained by Justice Stewart in *Coolidge, supra*, as follows:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or *some other legitimate reason for being present unconnected with a search directed against the accused*—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges. 403 US at 466; 91 S Ct at 2038 (Emphasis added)

In *Harris* v *United States*, 390 US 234; 88 S Ct 992; 18 L Ed 2d 1067 (1968), this court recognized the "plain view" doctrine as a well-established exception in the law of search and seizure:

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. *Ker* v *California*, 374 US 23, 42-43, 10 L Ed 2d 726, 743; 83 S Ct 1623 (1963); *United States* v *Lee*, 257 US 559; 71 L Ed 1202, 47 S Ct 746 (1927); *Hester* v *United States*, 265 US 57; 68 L Ed 898; 44 S Ct 445 (1924) 390 US at 236.

In the present case, the testimony indicates that the discovery of the deer was made by a fireman while acting in his official capacity, extinguishing a blaze at the petitioner's residence. Clearly the firemen had justification for their intrusion and were lawfully on the premises.

The discovery was inadvertent during the discharge of their duties. Standard procedure required the airing of the house to facilitate safe and efficient fire fighting. The fireman's entry into the connected building was to alleviate the smoke build-up in the house and allow the firemen to continue in their efforts to extinguish the blaze.

Furthermore, the deer were immediately recognized as contraband and seized under the direction of the fire chief. The fireman exercised dominion over the deer, guarding the door and thus preventing their removal.

The petitioner's contention that his Fourth Amendment rights were violated is wholly unsupported by the facts of this encounter. Further, the seizure of the evidence clearly falls within the "plain view" doctrine exception as outlined by *Harris, supra,* and *Coolidge, supra.*

The trial court properly denied Petitioner's motion to suppress and the Michigan Court of Appeals correctly affirmed Petitioner's conviction.

RELIEF

WHEREFORE, for all the foregoing reasons, Respondent respectfully requests this Honorable Court to deny Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Larry F. Farmer
Prosecuting Attorney

THOMAS C. NELSON /s/
Thomas C. Nelson
Assistant Attorney General
Department of Attorney General
Prosecuting Attorneys
Appellate Service
610 Law Building
525 West Ottawa
Lansing, Michigan 48913
Telephone: (517) 373-7971

Dated: October 20, 1977

AFFIDAVIT

STATE OF MICHIGAN }
COUNTY OF INGHAM } ss.

Thomas C. Nelson, being first duly sworn, deposes and says that he has read the foregoing, and it is true to the best of his knowledge and belief.

THOMAS C. NELSON /s/
Assistant Attorney General

Subscribed and sworn to before me
this 20th day of October, 1977.

CHERYL A. WORRALL /s/
Cheryl A. Worrall, Notary Public
Clinton County, Michigan
(Acting in Ingham)
My commission expires: 8/16/80